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ABSTRACT

By deciding some cases and refusing others, the United States Supreme Court has begun to provide answers to some of the legal questions concerning the interpretation of two federal statutes: Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975 (Public Law 94-142). The first of these statutes imposes a duty on recipients of federal funds to avoid discriminating against "otherwise qualified" handicapped persons. In Southeastern Community College v. Davis, the Court determined that "otherwise qualified" meant qualified "in spite of a handicap." The ruling in this case has since served as a standard in several other cases. The Court refused to review some cases involving alleged violations of Public Law 94-142, despite the apparent disregard by lower courts of a related Court decision that disallowed the establishment by Congress of retroactive conditions on acceptance of federal funds. The Court did determine in Board v. Rowley that Public Law 94-142 provided an adequate definition of the "free appropriate public education" it mandated, a definition involving the provision of personalized instruction with sufficient support services to permit affected children to benefit educationally, though not guaranteeing a particular level of education. (Author/PGD)

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Introduction

The United States Congress enacted two statutes in the 1970s that have had dramatic and far-reaching effects on the education of handicapped children by the public schools.

These two laws, Section 504 of the Rehabilitation Act of 1973[1] and The Education for All Handicapped Children Act of 1975[2] (universally known as Public Law 94-142), and the lengthy and complex regulations issued to explain their administration[3] have combined to require state and local public school agencies to provide new educational programs for thousands of handicapped children not previously served by the public schools. They have also given to federal bureaucrats unprecedented power to dictate both procedures and curriculum in public school programs for handicapped children throughout the United States.

One result of the efforts of local school officials to establish programs that comply with the demands of these two laws has been a flood of litigation, as parents and school officials have been unable to agree on the scope of the new educational rights accorded to handicapped children. The number of these cases has risen dramatically in the past five years.

The National Center for State Courts estimates that suits concerning the educational rights of handicapped students have comprised 35 to 40 percent of all the civil cases involving the rights of students filed since 1976[4]. Although most of these cases concern the educational needs of a particular student, a few have raised such fundamental legal issues about the educational rights conferred by the two federal statutes that the lower court decisions have been appealed to the United States Supreme Court. The Supreme Court, by accepting and deciding some of these cases and by refusing others and thus allowing lower court decisions to stand, has begun to provide local school officials with answers to some of the difficult and controversial legal questions about the meaning of Section 504 and of Public Law 94-142.

The purpose of this Legal Memorandum is to provide a brief summary of the beginning the Supreme Court has made on the educational rights of handicapped children, a subject certain to demand more of the Court's time in the future.

The Two Statutes

Section 504 of the Rehabilitation Act of 1973, which became law on September 26, 1973, provides, in part:

> No otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .[5]

There is no substantive legislative history upon which to explain what Congress intended by this provision because there were no public hearings accompanying the original bills and virtually no floor debate on the meaning of the legislation. Only after being ordered to do so by a federal court did the Department of Health, Education, and Welfare issue regulations to explain Section 504[6]. When the regulations were issued, then-Secretary David Mathews described Section 504 as: ". . . the first federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap."[7]

Section 504 is not a federal grant program; it provides no federal funds to aid handicapped persons. Instead, it imposes a duty on every recipient of any federal funds not to discriminate against handicapped persons. Thus, it regulates a wide variety of governmental programs for both adults and children, including educational programs that receive federal funds at the college and public school levels. Because the regulations to explain Section 504 were not issued until after the passage by Congress of Public Law 94-142, an effort was made to coordinate the regulatory requirements imposed by Section 504 on elementary and secondary public school programs with the corresponding provisions of the separate regulations issued for Public Law 94-142.

Public Law 94-142, The Education for All Handicapped Children Act of 1975, is a federal grant program enacted as the culmination of more than a decade of federal efforts to stimulate the states to provide a free public school education for handicapped children. Passed in the wake of two federal court decisions holding that handicapped children have a legal right to access to a free public education[8] and because of dissatisfaction with the progress being made under earlier federal programs, Public Law 94-142 dramatically increased the amount of federal money available to the states and, at the same time, required states receiving the money to provide all handicapped children the right to a "free appropriate public education."

Public Law 94-142 is an unusually detailed statute that sets forth a specific, complex, and comprehensive design for the education of handicapped children, a design that states must follow to receive the federal funding available under the law. On signing the law, President Gerald Ford commented that it promised

far more federal money than would actually be available, and he complained that it contained ". . . a vast array of detailed, complex and costly administrative requirements which would unnecessarily assert federal control over traditional state and local government functions."[9]

The Meaning of Section 504
Southeastern Community College v. Davis

One of the first and most important legal issues to arise under Section 504 was the meaning of the phrase "otherwise qualified handicapped individual." When Congress prohibited discrimination against an "otherwise qualified handicapped individual," did it intend that every federally assisted education program be made available to a handicapped individual who could prove he was qualified except for his handicap?

A literal reading of "otherwise qualified" suggests that meaning. Such an interpretation, however, might require that a blind student be provided driver training if he had all the qualifications except for his sightlessness. On the other hand, Congress may have intended that a handicapped individual may not be discriminated against if he can show that he has all the qualifications for a program in spite of his handicap.

It was not until 1979 that the Supreme Court resolved this important question in Southeastern Community College v. Davis,[10] the Court's first decision on the meaning of Section 504.

Frances B. Davis sought admission to the clinical training program for registered nurses at Southeastern Community College even though she was hearing-impaired and could only understand speech effectively by lip reading. When the college declined to admit her to the program because her inability to hear would make it unsafe for her to care for patients, she brought suit under Section 504, arguing that she was "otherwise qualified" except for her handicap, and alleging that the Section 504 regulations issued by the Department of Health, Education, and Welfare required Southeastern to modify its nursing curriculum in whatever ways were necessary to permit her to participate. She was supported in that interpretation by the Department of HEW, and the case reached the Supreme Court when the college appealed a decision of the U.S. Court of Appeals in Davis' favor.[11]

The Supreme Court reversed the Appeals Court decision because it found Congress intended the phrase, "otherwise qualified handicapped individual," to mean a person who could meet all of a program's requirements in spite of a handicap. The Court pointed out that the HEW regulations issued under Section 504 supported that conclusion. In writing the regulations, HEW chose to use the term "qualified handicapped person" to replace the term used in the law, "otherwise qualified handicapped person," explaining that Congress must have intended to prohibit discrimination when the handicapped person is fully qualified in spite of the handicap. In addition, the Supreme Court noted that the regulations permitted the college to require handicapped individuals to meet all the academic and technical requirements for a program, including legitimate physical requirements.

The Supreme Court totally rejected the contention of Davis and HEW that Section 504 imposed on Southeastern an affirmative duty to modify its nursing program to accommodate her handicap, saying:

> . . .neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks authority to do so.[12]

The Supreme Court's decision in Southeastern has been understood by the lower federal courts as limiting the scope of Section 504 by saying that its fundamental purpose is to prohibit discrimination against handicapped individuals who are qualified rather than to mandate affirmative action to accommodate their needs. For example, a United States District Court has held that a high school did not violate Section 504 by denying participation in a field trip to Spain to a physically handicapped pupil because she would be unable to do the extensive walking required. The court held she was not "otherwise qualified" in accordance with the Southeastern decision.[13]

In another case, however, the United States Court of Appeals for the Fifth Circuit has rejected a claim by the University of Texas that the Southeastern decision precluded relief under Section 504 for a deaf university student seeking a sign language interpreter to aid him in a graduate course. The United States Supreme Court sent this case back to the trial court to determine whether the student or the university is required to pay for the interpreter.[14]

In a case with potential nationwide significance, a United States Court of Appeals has reversed a finding that public school programs for handicapped children in New Mexico are in violation of Section 504. The court has ordered the trial court to reconsider that issue within the restrictions imposed by the Supreme Court's opinion in Southeastern.[15] This New Mexico case may become nationally important because the state elected not to participate in the federal funding available under Public Law 94-142 in order to avoid the expensive affirmative action requirements of that program.

Many other states are watching the case to see if New Mexico will be able to comply with Section 504 by providing public school programs for the handicapped that are significantly less expensive than those required to meet the affirmative action requirements imposed on states participating in Public Law 94-142 funding.

The Court of Appeals has pointed out that New Mexico's present programs may violate Section 504 by failing to provide appropriately for handicapped children, but it has instructed the trial court to decide that issue by careful adherence to the meaning of the law established by the Supreme Court's Southeastern decision. The Supreme Court may be called upon to make the final decision in this case because of its potential effect on public school programs for handicapped children in all the states.

Public Law 94-142: "Free Appropriate Public Education"

All of the states except New Mexico are receiving the federal funds that Public Law 94-142 makes available for the education of handicapped children and are, therefore, required to provide every handicapped child with a "free appropriate public education" in accordance with the provisions of the law and its supporting regulations. The Supreme Court has held that Congress may legally attach conditions to the use of federal funds granted to the states,[16] and Congress has frequently used this technique to control educational policy decisions of the states. The Supreme Court recently discussed just how specific these congressional controls can be in the case of Pennhurst v. Halderman.[17]

Plaintiffs in this case sought to require Pennsylvania to close the Pennhurst State School, a facility for the care and treatment of the mentally retarded, and to provide instead community-based living and treatment arrangements for the residents. It was alleged that Pennsylvania was required to make these changes by virtue of accepting federal grants under the Developmentally Disabled Assistance and Bill of Rights Act. In its decision rejecting these claims, the Supreme Court cautioned Congress about the imposition of duties on a state that accepts federal grant funds.

> . . . Congress must express clearly its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds. . . . Though Congress' power to legislate under the Spending Power is broad, it does not include surprising participating states with post-acceptance or "retroactive conditions."[18]

In spite of the fact that Public Law 94-142 attempts to indicate clearly the legal obligations that accompany its grant funds, the states that have accepted Public Law 94-142 funds have been surprised by a number of these post-acceptance or retroactive conditions on their educational programs. Many of these surprises have resulted from decisions of lower federal courts that the Supreme Court has refused to review.

One of the most comprehensive of these post-acceptance restrictions has come from the holdings of several federal courts that handicapped children may not be disciplined under the state laws that apply to the nonhandicapped public school student.[19] The most noted of these decisions was rendered in the United States Court of Appeals for the Fifth Circuit in S-1 v. Turlington.[20]

In this case the Court of Appeals held that school officials in Hendry County, Fla., violated the Public Law 94-142 regulations when they expelled several educable mentally retarded students using procedures established by Florida law for all students. The court found that Public Law 94-142 provides for a specific and lengthy due process procedure to be available when a handicapped child's educational placement is changed, and the court held that this pro-

cedure must be followed if a handicapped child is to be expelled. In the opinion of the court, an expulsion is a change in educational placement.

Florida officials argued that there was nothing in the history of Public Law 94-142 to suggest that Congress intended to exempt handicapped children from the normal disciplinary procedures established by state law. The court's holding, they emphasized, would lead to a situation in which a student confined to a wheelchair because of an orthopedic handicap could not be expelled if found selling drugs on campus or for physically attacking a teacher, conduct that would justify expulsion of any student under Florida law.

In addition, school officials pointed out that the court was depriving handicapped children of the opportunity to learn that they would be held responsible by society for their actions, an important lesson for every child. The Supreme Court has declined to review this case, thus leaving the decision of the Fifth Circuit standing.[21]

Another surprise the states have received comes from a decision of the United States Court of Appeals for the Third Circuit. In Battle v. Commonwealth of Pennsylvania [22] that court held that a state receiving funds under Public Law 94-142 may be required to provide an educational program for a handicapped child on a 12-month basis even though state policy limits free educational programs for any student to 180 days a year.

The court said that Public Law 94-142's emphasis on the individual treatment of handicapped children requires the state government to determine whether each handicapped child needs free appropriate public education for more than 180 days, taking into consideration the regression that may occur if there are interruptions in the particular child's education imposed by the 180-day rule. Once again, the United States Supreme Court has declined to review this case, leaving the Court of Appeals decision standing as the law, at least in those states governed by the Circuit Court's jurisdiction.[23]

The Supreme Court also decided not to review a decision by the Fifth Circuit Court of Appeals that the ruling of a state-level hearing officer in a due process hearing under Public Law 94-142 must be final unless appealed to a court; a state cannot make the hearing officer's decision subject to approval by the state board of education.[24] Finally, the justices have declined to review a decision of the Third Circuit Court of Appeals that catheterization is a "related service" that school districts must provide under Public Law 94-142.[25]

The Supreme Court's first full consideration of the meaning of Public Law 94-142 came last spring in the case of Board v. Rowley.[26] The Court's opinion in this case will have a significant impact on future cases, both because it is the Court's first interpretation of Public Law 94-142 and because in it the Court defined the meaning of the phrase "free appropriate public education."

The case arose when the school district denied a request to provide a sign language interpreter in the first-grade classroom for Amy Rowley, a deaf child. School officials based the refusal on the fact that Amy was already

making above average academic progress by using her excellent lip reading skills and a special hearing aid provided for her. When the refusal to provide the sign-language interpreter was upheld by a local hearing officer and confirmed by the New York Commissioner of Education, Amy's parents brought suit in the United States District Court.

The District Court found Amy to be a remarkably well-adjusted child who was communicating well with her classmates, achieving an extraordinary rapport with her teachers, and advancing easily from grade to grade. Nevertheless, the court held that she was not receiving a "free appropriate public education" without the sign-language interpreter because, in the opinion of the court, that term required that the school provide Amy an "opportunity to achieve her full potential commensurate with the opportunity provided to other children."[27]

The District Court, in a remarkable judicial disregard of the facts, also ruled that the job of defining "free appropriate public education" had not been done by the Congress but had been left completely to the federal courts and hearing officers. A divided United States Court of Appeals sustained this decision,[28] and the school district appealed.

The United States Supreme Court reversed the lower court decision in favor of Amy and completely rejected the definition of "free appropriate public education" adopted by the District Court. The Supreme Court wrote:

> . . . Certainly the language of the statute contains no requirement like the one imposed by the lower courts--that states maximize the potential of handicapped children "commensurate with the opportunity provided to other children." 483 F. Supp., at 534. That standard was expounded by the District Court without reference to the statutory definition or even to the legislative history of the Act.[29]

The Supreme Court found that Public Law 94-142 itself contained a specific and detailed definition of "free appropriate public education." That definition states that the term means special education and related services that meet the standards of the state education agency, are provided at public expense and under public supervision, and are provided in conformity with the required individualized education program.

The Supreme Court also examined the history of Public Law 94-142 to determine whether Congress intended the special education provided handicapped children to meet any additional substantive standard. The Court concluded that Congress' intent was to open the door to public education for handicapped children rather than to guarantee any particular level of education. Thus, the Court held:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a state is required to provide a handicapped child with a "free appropriate public

> education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. . . .[30]

Because Amy Rowley was receiving personalized instruction and related services from which she was obviously benefiting, the Supreme Court found the lower courts were wrong to order the school district to provide the sign-language interpreter for her.

Conclusion

The Supreme Court's opinion in Board v. Rowley may raise as many questions as it answers; that is frequently the result of the Supreme Court's first opinion in any area of federal law. Nevertheless, the decision deserves to be read and studied by public school administrators involved in the education of handicapped youngsters because it will certainly affect lower court holdings in future cases. The Supreme Court has already vacated a decision of a United States Court of Appeals which held that another deaf student could be provided an appropriate education by the local school district even though the child might get a better education at the state school for the deaf. The Supreme Court has directed the lower court to conduct further proceedings in the case consistent with the Court's opinion in Board v. Rowley.[31]

School administrators also need to be aware that the Supreme Court is allowing many lower court decisions that expand the obligations of the states under Public Law 94-142 to stand without review. In view of the heavy demands on the time of the Supreme Court, it appears likely that important law in this area will continue to be made by the lower courts without review by the Supreme Court. Even so, it is clear that the Supreme Court will be asked to spend more time in the future on the educational rights of handicapped students under Section 504 and Public Law 94-142.

Footnotes

1. 29 U.S.C.§794.
2. 20 U.S.C. §1401 et seq.
3. The regulations for Section 504 are in 45 C.F.R. part 84. The regulations for Public Law 94-142 were originally in 45 C.F.R. part 121a, but have been recodified to 34 C.F.R. part 300. On August 4, 1982, the Department of Education published a proposal to make significant changes in the Public Law 94-142 regulations. See 47 Fed. Reg. 33836.
4. Thomas Marvell, Armand Galfo, and John Rockwell, Student Litigation: A Compilation and Analysis of Civil Cases Involving Students 1977-1981, (Williamsburg, Virginia, National Center for State Courts, 1981), p. 18.
5. 29 U.S.C. §794.
6. *Cherry v. Mathews*, 419 F. Supp. 922 (1976).
7. 42 Fed. Reg. 22676 (May 4, 1977).
8. *Pennsylvania Association for Retarded Children v. Commonwealth of Pa.* 334 F. Supp. 1257 (1971); *Mills v. Board of Education*, 348 F. Supp. 866 (1972).
9. Statement by President Gerald Ford on signing Public Law 94-142, December 2, 1975, 1 EHLR 11:201.
10. 99 S. Ct. 2361 (1979).
11. 574 F.2d 1158 (4th Cir. 1978).
12. 99 S. Ct. 2369, 2370.
13. *Wolff v. South Colonie Central School District*, 534 F. Supp. 758 (1982).
14. *University of Texas v. Camenisch*, 616 F. 2d 127 (5th Cir. 1980), vacated, 101 S. Ct. 1830 (1981)
15. *New Mexico Association for Retarded Citizens v. State of New Mexico*, 678 F. 2d 847 (10th Cir. 1982).
16. *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).
17. 101 S. Ct. 1531 (1981).
18. 101 S. Ct. 1543, 1544.
19. *Stuart v. Nappi*, 443 F. Supp. 1235 (1978); *Doe v. Kroger*, 480 F. Supp. 225 (1979).
20. 635 F. 2d 342 (5th Cir. 1981.
21. 102 S. Ct. 566 (1981).
22. 629 F. 2d 269 (3rd Cir. 1980).
23. sub nom., *Scanlon v. Battle*, 101 S. Ct. 3123 (1981).
24. *Helms v. McDaniel*, 657 F. 2d 800 (5th Cir. 1981), cert. denied, 102 S. Ct. 1443 (1982).
25. *Tokarcik v. Forest Hills*, 665 F. 2d 443 (3rd Cir. 1981), cert. denied, sub nom., *Scanlon v. Tokarcik*, 102 S. Ct. 3508 (1982).
26. 102 S. Ct. 3034 (1982).
27. 483 F. Supp. 534.
28. 632 F. 2d 945 (2nd Cir. 1980).
29. 102 S. Ct. 3042.
30. 102 S. Ct. 3049.
31. *Springdale School District v. Grace*, 656 F. 2d 300 (8th Cir. 1981), vacated, 102 S. Ct. 3505 (1982).

This Legal Memorandum was prepared by T. Page Johnson, director of administrative services for the Fairfax County (Va.) Public Schools, and adjunct professor of school law at the University of Virginia.

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